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IN THE

Supreme Court of the United States

1971 - October Term
No.

JEAN VIVAUDOU,

Petitioner,

v.

ROYAL NATIONAL BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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In The

SUPREME COURT OF THE UNITED STATES

~~April Term,~~ 1972

JEAN VIVAUDOU,

Petitioner,

v.

ROYAL NATIONAL BANK OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

TO: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Vivaudou, respectfully prays that a writ of certiorari issue to review a determination of the Appellate Division of the Supreme Court of the State of New York, first department, affirming an order made at Special Term denying petitioner's motion to vacate a default judgment entered May 7, 1957.

Opinion Below

No opinion was rendered by the courts below except for the memorandum opinion of the court at Special Term copy of which is appended hereto. The opinion is not officially reported.

Jurisdiction

The order sought to be reviewed is an order of the Appellate Division of the

Supreme Court of the State of New York, first department, dated and entered September 23, 1971 (37 App. Div. 2d 802). The Court of Appeals of the State of New York dismissed petitioner's appeal from said order taken as of right, by order dated and entered November 18, 1971. (29 N.Y. 2d 822)

Application for leave to appeal to the Court of Appeals was timely made pursuant to Section 5514 CPLR. The order of the Appellate Division became the final determination of the highest court of the state in which a decision of the constitutional question herein involved could be raised within the meaning of 28 U.S.C. 1257 on entry of the order of the Appellate Division denying petitioner leave to appeal on January

13, 1972. (Not reported to date. This petition for a writ is in time pursuant to Rule 22(3) of the Rules of the Supreme Court and 28 U.S.C. 2101 (6) if filed with the Clerk by April 12, 1972. Copies of said orders are appended hereto.

Jurisdiction is asserted under Section 1 of the Fourteenth Amendment to the United States Constitution.

Questions Presented for Review

The basic question presented for review is whether the refusal of a state court to vacate a default judgment for claimed lack of service of the summons and complaint and lack of jurisdiction of the court, deprived petitioner of his constitutional right to due process of law and equal protection of the law

under the Fourteenth Amendment, where the court, without making any determination of the contested jurisdictional fact issue, denied petitioner a hearing and held that he was estopped by laches from showing that the summons and complaint had never been served.

Petitioner's motion to vacate the default judgment raised the constitutional question of the validity of a default judgment entered without service of process (Appendix on Appeal to the Appellate Division, pp A-13, 40, 41). Special Term held petitioner was barred by laches from challenging the propriety of the service.

The appeal to the Appellate Division raised the additional constitutional question of the petitioner's right to a hearing and determi-

nation of the contested question of service of process. The Appellate Division affirmed unanimously without opinion and in effect held that petitioner had not been denied his constitutional rights by the order appealed from.

Constitutional Provisions

Section 1 of Amendment 14 to the Constitution of the United State provides in part as follows :

> ".... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jursidiction the equal protection of the laws."

Statement of the Case and Facts

On November 30, 1970 petitioner moved in

the Supreme Court of the State of New York to vacate a default judgment for $21,089.31 entered on May 7, 1957 in an action instituted in that court by respondent against petitioner. The judgment was based on an affidavit of personal service of the summons and complaint on petitioner in New York city on April 3, 1957.

Petitioner showed that on April 3, 1957 and for several months prior thereto he resided in Puerto Rico where he was engaged in real estate and other substantial business transactions and was not served with process in New York city as claimed by the plaintiff. To support his statements of his recollection of his presence in Puerto Rico and his absence from New York in April 1957, petitioner presented to the

court copies of letters sent by him from San Juan, Puerto Rico, dated April 2, 1957, one day prior to the date of the alleged service, and April 8, 1957, and a credit memorandum issued to his wife dated February 7, 1957 and stated that other similar supporting records were available.

Petitioner's claim of non-service supported by his documentary proof raised a substantial fact question as to the truth of the process server's affidavit and the jurisdiction of the court to enter a default judgment.

Petitioner showed that he had no notice of the institution of the action until January 1967 when respondent first instituted enforcement proceedings under the judgment, and that he was first alerted to the

facts showing the invalidity of the judgment by his attorney in November 1970.

The state court denied petitioner's motion to vacate in an order reading as follows:

> "Defendant moves to vacate a default judgment entered on May 1957, on the ground that he was not personally served with summons and complaint. From the opposing papers submitted, it appears that defendant has been aware of this judgment for approximately thirteen years, and concededly during the past four years he had been involved with plaintiff in enforcement proceedings thereof. Even if this Court were not to charge defendant with gross laches (Broderick

v. Saretsky, 39 N.Y.S. 2d 802) defendant is estopped from challenging the propriety of service in the principal action since he participated in the enforcement proceedings without making any objection thereto. Hence the motion to vacate is denied.

Dated, December 24, 1970."

It is to be noted that the court in denying the motion made no determination of the jurisdictional fact questions and denied petitioner a hearing on the contested question of service. Broderick v. Saretsky, referred to by the court was a decision made after a hearing wherein the Appellate court reversed a referee's finding as against the weight of the evidence and held that gross laches was

a bar to opening up the defendant's default and giving him leave to appear and answer.

As to the factual basis for laches or estoppel the court relied on statements made, as noted in the opinion, in the "opposing papers" and ignored petitioner's specific denial of the truth of those statements. The court concluded that petitioner's "participation" in enforcement without objection barred the granting of relief although such "participation" consisted only of signing stipulations consenting to adjourn examinations which were never held, without awareness of the invalidity of the judgment by petitioner or respondent, and no reliance on such participation or resulting prejudice to respondent was shown.

Reasons for Allowance of the Writ

Petitioner seeks review of the state court order to protect his constitutional right to object to a default judgment entered without service of a summons and complaint.

The question of the jurisdiction of the court to enter the default judgment was submitted to the state court by the motion made by petitioner in the action in which the judgment was entered. That question may be held to have been determined and to be res judicata in any subsequent plenary action, unless the order is reviewed and reversed by this court, even though the state court order was erroneous, the court was in fact and in law without jurisdiction to enter any judgment and the determination itself was made in violation of constitutional procedural restrictions.

American Surety Co. v. Baldwin, 287 U.S. 156

Bonner v. Gorman, 213 U.S. 86, 91

Frazier v. East Baton Rouge Parish School Board
363 Fed (2d) 861, 5th Circ, 1966

In American Surety the court wrote:

"The principles of res judicata apply to questions of jurisdiction as well as to other issues. ... They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. ..." 287 U.S. at 166

See: 47 American Jurisprudence 2d, 275, section 1289 as follows:

"..... a judgment of a state court having the requisite jurisdiction will operate as res judicata and a bar in a federal court. This rule has even been applied to a state court's erroneous adjudication of a federal question which is a bar to a subsequent litigation of such question between the same parties in a diversity case in the federal court....."

Relying on the foregoing citations respondent has contended that the New York order is res judicata in an action filed by petitioner on February 8, 1972 in the United States District Court, Southern District of New York, seeking judgment declaring the New York judgment void, enjoining enforcement and for damages. (Jean Vivaudou, plaintiff, v. Royal National Bank of New York, defendant, File # 72 Civ 574). Respondent has moved to dismiss the action on the ground of res judicata insisting that the petitioner's only remedy is by review of the state court order by this court. (Motion returnable April 25, 1972)

The order sought to be reviewed, to the extent that it may be held to be a final determination that petitioner may not, because of laches, question the jurisdiction of the

court to enter the default judgment or to enforce it, is clearly in conflict with the decisions of this court and deprives petitioner of due process of law.

Griffin v. Griffin 327 U.S. 220, 228-9

Hansberry v. Lee 311 U.S. 32, 40-41

Simon v. Southern Railway 236 U.S. 115,122

In SIMON the court said, referring to judgments obtained without service of process:

> "Such judgments are not erroneous and not voidable but upon principles of natural justice and under the due process clause of the Fourteenth Amendment, are absolutely void... On principle and authority therefore, a judgment obtained in a suit of which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief." at p. 122

For a similar expression of the rule see Moore, Federal Practice, Section 60.25

(4) as follows:

> "The Theory underlying the concept of a void judgment is that it is legally ineffective - a legal nullity and may be vacated by the court which rendered it at any time. Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life
> .....

The decisions of the New York courts leave no doubt that the state law is in accord.

Ingersoll v. Mangam, 84 N.Y. 622
Korn v. Lippman 201 N.Y. 405, 406
Valz v. Sheepshead Bay Bungalow Corp. 249 N.Y. 122, 132
O'Connell v. Gallagher, 104 App. Div. 492, 495

In Valz the court wrote:

"It is .. urged that the construction of the Constitution is not directly or necessarily involved in this appeal because the decision of the courts below might be based upon a finding of estoppel or laches... The answer to that contention is that the courts below did not and could not find estoppel or laches. There can be no estoppel based upon failure of the non-resident defendants... either to

appear in that action or to take other steps to assert their rights .. unless some duty to act in assertion of their rights was placed upon such defendants. If they received legal notice, which called upon them to assert their rights in the proper forum, then the court had jurisdiction to enter judgment....If they had no such notice, then it seems clear that they were under no duty to assert their rights until they chose to do so, and failure to act earlier, where there was no duty, can create no estoppel. " 249 N.Y. at 132-3

"There is no field for the exercise of discretion where there is no jurisdiction in the court under the statute. " 249 N.Y. at p. 136.

The rule was similarly noted in

O'CONNELL:

"Under such circumstances the defendant was justified in waiting until the judgment was sought to be enforced. The question of laches therefore cannot be considered, as the defendant had the legal right to have this judgment set aside at any time upon it appearing that it had been entered

without actual service of the summons.." (104 App. Div. 492, 495)

Denial of a hearing on the contested issue of service of the summons and complaints and refusal to make a factual determination as to the claim of non-service or the lack of jurisdiction of the court, deprived petitioner also of his constitutional right to a trial by the court, if not by the court and jury, and, since it was in violation of clearly established New York law, deprived petitioner of the equal protection of the law.

Matter of Speranzo, 186 N.Y. 280, 284
General Investing Co. v. Interborough Rapid Transit, 235 N.Y. 133
Kranta v. Salvio, 283 App. Div. 965

Accordingly, because of the substantial conflict of the rule of the state court order with the decisions of this court and because the bind-

ing effect that may be given to the state court order, as claimed by respondent, would result in the loss of petitioner's constitutional rights, if the erroneous determination of the state court is not reversed, the court is respectfully requested to allow review of the order of affirmance of the Appellate Division and to grant the requested writ of certiorari.

Conclusion

Petitioner's application for a writ of certiorari should be allowed.

Dated, New York, N. Y. April 10, 1972.

DAVID SIMON
Counsel to petitioner

ORDER APPEALED FROM

Index #5133 - 1957

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, N.Y. 10007

PRESENT:

HON. BIRDIE AMSTERDAM,
Justice.

ROYAL STATE BANK OF NEW YORK,

Plaintiff,

- against -

Filed Dec. 28, 1970 NY Co Clk's office

JEAN VIVAUDOU

Defendant

The following papers numbered 1 to 20 read on this motion submitted No. 180 on Calender of Dec. 21, 1970

(APPENDIX A)

	Papers Numbered
Filed order to show cause and affidavit annexed and exhibits	1 - 4
Answering affidavit and exhibits	6 - 16
Replying affidavit and exhibits	17 - 20
O.S.C. affidavit proof of service	5

Defendant moves to vacate a default judgment entered on May 7, 1957, on the ground that he was not personally served with summons and complaint. From the opposing papers submitted, it appears that defendant has been aware of this judgment for approximately thirteen years, and concededly during the past four years he has been involved with plaintiff in enforcement proceedings thereof. Even if this Court were not to charge defendant with

gross laches (Broderick v. Saretsky, 39 N.Y. S. 2d 802) defendant is estopped from challenging the propriety of service in the principal action since he participated in the enforcement proceedings without making any objection thereto.

Hence the motion to vacate is denied.

Dated: December 24, 1970

Briefs: Plaintiff's ___/___

Birdie Amsterdam
J.S.C.

(APPENDIX A)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of September, 1971

Present Hon: Emilio Nunez, Justice Presiding
" Theodore R. Kupferman
" Francis T. Murphy, Jr.
" Aron Steuer
" George Tilzer, Justices

Royal National Bank of New York formerly known as Royal State Bank of New York.

Plaintiff-respondent

against

Jean Vivaudou

Defendant-Appellant

Affirmance of Order
4123 - N

(APPENDIX B)

An appeal having been taken to this Court by the defendant appellant from an order of the Supreme Court, New York County, (Amsterdam, J.) entered on the 28th day of December, 1970, denying defendant-appellant's motion to vacate a default judgment entered May 7, 1957, and said appeal having been argued by Mr. David Simon, of counsel for the appellant, and by Mr. Sol S. Perlow, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondent.

ENTER:

(Reported, 37 App. Dvi. 2d 802)

HYMAN W. GAMSO,
Clerk

(APPENDIX B)

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of November A.D. 1971

PRESENT, HON. STANLEY H. FULD, Chief Judge, Presiding,

Mo. No. 932

Royal National Bank of New York formerly known as Royal State Bank of New York

Respondent,

vs.

Jean Vivaudou,

Appellant.

(APPENDIX C)

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution

Larry Kimball
Deputy Clerk

(Reported, 29 N.Y. 2d 822)

(APPENDIX C)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 13, 1972

Present Hon. Emilio Nunez, Justice presiding
Theodore R. Kupferman
Francis T. Murphy
Aron Steuer
George Tilzer Justices

Royal National Bank of New York, formerly known as Royal State Bank of New York

M-8336

Plaintiff-Respondent

-against-

Jean Vivaudou

Defendant-Appellant.

(APPENDIX D)

The above named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court on September 23, 1971

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of David Simon in support of said motion, and the affidavit of Sol. S. Perlow in opposition thereto, and after hearing Mr. David Simon for the motion, and Mr. Sol S. Parlow opposed,

It is ordered that said motion be and the same is hereby denied with $10 costs.

ENTER:

HYMAN W. GAMSO
Clerk

(Not reported to date)

(APPENDIX D)